# UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD DIVISION OF JUDGES

EAST VILLAGE GRAND SICHUAN, INC. D/B/A GRAND SICHUAN

Respondent

and

Case 02-CA-086946

CHINESE STAFF & WORKERS ASSOCIATION

**Charging Party** 

Rebecca Leaf, Geoffrey Dunham and Audrey Eveillard, Esqs., for the General Counsel.

Benjamin B. Xue, Esq., of New York, NewYork, for the Respondent.

Nicole Hallet, Esq., of New York, NewYork, for the Charging Party.

# **DECISION**

#### Statement of the Case

MICHAEL A. ROSAS, Administrative Law Judge. This case was tried in New York, New York, on June 5–6, 14, and 20, 2013. The Charging Party Chinese Staff & Workers Association filed the charge on August 9, 2012, and amended charge on August 30, 2012. The General Counsel issued the complaint on February 27, 2013 alleging that East Village Grand Sichuan, Inc. d/b/a Grand Sichuan (the Company) violated Section 8(a)(1) of the National Labor Relations Act (the Act) by discharging Lian Tong Chen (Chen) and Chang Hui Lin (Lin) on April 2 and 10, respectively, and issuing a final warning to Jiang Xing Duan (Jiang) on April 18, because they engaged in protected concerted activities.

On the entire record,<sup>2</sup> including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Company, I make the following

<sup>&</sup>lt;sup>1</sup> All dates are 2012, unless otherwise indicated.

<sup>&</sup>lt;sup>2</sup> The General Counsel's unopposed motion to correct the transcript, dated July 8, 2013, is granted and received in evidence as GC Exh. 19. The Company's separate and untimely motion to correct the transcript, submitted one day after briefs were filed on August 21, 2013 and opposed by the General Counsel on that basis, is denied. It is designated R. Exh. 13 and included in the Rejected Exhibits file.

## FINDINGS OF FACT

#### 5 I. JURISDICTION

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The Company, a corporation, operates a public restaurant in New York, New York (the restaurant), where it serves and delivers food and beverages to individual customers. In conducting its business at said restaurant, the Company annually derives gross revenues in excess of \$500,000, and purchases and receives goods in excess of \$50,000 from other enterprises, which themselves are directly engaged in interstate commerce. The Company admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

#### II. ALLEGED UNFAIR LABOR PRACTICES

# A. The Company's Operations

The Company is owned by Xiao Tu Zhang (Zhang), Yuan Wei Tsao a/k/a Yuan Wei 20 Cao (Tsao), and Lu Zhung Run. The restaurant operates 7 days per week from 11 a.m. to 3 p.m., and 5 p.m. to 11 p.m. Zhang and Tsao visit about once a week. Since February 18, the restaurant has been managed by Wang Tian Shan a/k/a Sam Wang (Wang). Wang hires and fires all restaurant employees, buts reports directly to Zhang and Tsao.<sup>3</sup>

The restaurant employs over 20 employees in several capacities: cashiers, waiters, chefs, cooks, food preparers, dishwashers, packers, and delivery employees. The busboy, cashier, delivery employees, and waiters report to the manager. Jiang, Chen and Lin were employed as delivery employees during the period of January to April 2012. Employees generally speak one of three Chinese dialects—Mandarin, Cantonese, and Foochow.<sup>4</sup>

## B. Lin Complains About Wages

In November or December 2011, the Company terminated Tang Xue Qin ("Qin"), a packer.<sup>5</sup> Shortly thereafter, Tsao learned that Qin sought assistance from the charging party, the Chinese Staff and Worker's Association. Tsao found out and asked Lin what Qin was up to. Lin

<sup>&</sup>lt;sup>3</sup> Wang testified that he makes all of the hiring decisions, but it is also evident from testimony by Tsao and Zhang that, although present at the restaurant about once a week, they are also involved in its management. (Tr. 42, 71–72, 93–94, 469–470, 635–638.) Their roles were further confirmed through Lin's credible testimony. (Tr. 187–188, 206–209.) All three are admittedly statutory supervisors and agents. (Jt. Exh. 1; Tr. 205.)

<sup>&</sup>lt;sup>4</sup> Most of the transactions were conducted in the Mandarin and Foochow dialects, but some employees also spoke Cantonese. (Tr. 30, 32, 36-37, 70, 92, 99-100, 264, 271, 390, 512, 564, 617.)

<sup>&</sup>lt;sup>5</sup> Qin was apparently reinstated after a month. (Tr. 189-190, 214, 353-354.)

explained that Qin sought to file a wrongful termination action against the Company.<sup>6</sup> Lin also took the opportunity to complain about the Company's longstanding failure to compensate employees at the minimum wage, as well as for overtime work.<sup>7</sup>

# C. Employees Discuss Legal Action Against the Company for Unpaid Wages

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During their break periods, the delivery workers frequently congregate on a balcony that the restaurant shares with the Chipotle restaurant. From late December 2011 to April 2012, Jiang, Lin, Chen and other delivery workers met there once or twice a week during breaktime to discuss unpaid minimum wages and overtime wages, the lack of salary increases, and bringing a law suit relative thereto. On at least 10 occasions, Wang and/or Tsao observed Jiang, Lin, and Chen through the door's glass windows from about 25 feet away as they spoke about wages and taking legal action. While Wang understood Foochow, the Chinese dialect spoken by the delivery workers, he could not hear what they were discussing on the balcony from inside the restaurant door. On several occasions, however, Wang and Tsao approached the delivery employees to ask what they were speaking about.

# D. Employees Reject Company's Offer to Reimburse Them for Unpaid Wages

In February, Tsao met with Jiang and Lin at a nearby coffee shop to discuss their wage concerns. Tsao acknowledged that they had been underpaid for years and offered to reimburse them several thousand dollars for approximately 3 years of back pay. Lin responded that the Company owed them up to 6 years of backpay, but indicated they would consider Tsao's proposal. Several days later, Jiang informed Tsao that he and Lin would accept no less than

<sup>&</sup>lt;sup>6</sup> Jiang, Chen, and Lin subsequently commenced an action for unpaid wages in the United District Court for the Southern District of New York on November 15, after charges were filed in this case. (GC Exh. 3.)

<sup>&</sup>lt;sup>7</sup> I did not credit Tsao's terse denial that he spoke to any employees about minimum wage or overtime in December 2011. (Tr. 471.) Lin's version of their conversation was more detailed and credible. (Tr. 188, 190, 213–215.)

<sup>&</sup>lt;sup>8</sup> R. Exhs. 5 and 9 accurately depict Chipotle, the length of balcony and the distance from the restaurant's front door.

<sup>&</sup>lt;sup>9</sup> It is not disputed that Jiang, Lin, and Chen engaged in discussions during the restaurant's breaktime on several occasions during the early part of 2012. (Tr. 106–108, 192–194, 268–270.)

Wang corroborated Chen's testimony that Wang understood the Foochow dialect. (Tr. 92.) However, there was no convincing testimony from Chen, Jiang, or Lin that one can hear outside conversation while standing inside the restaurant. (Tr. 271–274.) Moreover, much of the critical time period between January and April 9 would have transpired during the winter and one would reasonably expect the restaurant doors to be closed.

Wang corroborated the testimony of Jiang, Lin, and Chen that he observed them during their discussions on the balcony during breaks. (Tr. 110–111, 195–196, 271–272, 294–296, 524–525; R. Exh. 9.) Chen, however, would leave the area whenever Tsao approached them on the balcony. (Tr. 296–270.)

\$50,000 to \$70,000 in back wages. Tsao told Jiang that their demand was too high and that they should just commence legal proceedings. 12

# E. Employees Refuse to Sign Blank Wage Reporting Forms

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On March 24, Wang and Zhang met with the delivery employees and distributed an employee manual and a New York State Department of Labor (DOL) Wage Theft Prevention Act (WTPA) notice and form for them to sign and return.<sup>13</sup> However, while the delivery workers and waiters received both pages of the WTPA form, other employees only received page 1. Notwithstanding the WTPA's requirement that the forms contain the requisite pay information when provided to employees, Zhang and Wang distributed blank forms and instructed them to sign and return them at that time. Jiang and Chen were among those present who did not sign and return the blank form. Lin was in China at the time and never received the notice or manual.<sup>14</sup>

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Within the next several weeks, Wang continued to press the delivery workers to sign and return the blank WTPA forms. Jiang, Chen and Chen Hao, the other delivery worker, discussed their concerns about signing the blank form and being shortchanged by the Company. In early April, Wang and Zhang again asked Jiang to sign the WTPA notice. However, Jiang expressed his concerns about the outstanding wage claims and indicated that he would not sign the form until Qin returned from a trip to China. Chen, on the other hand, told Wang that he would sign the form if everyone else signed it. Wang responded that the outstanding wage issues were irrelevant.<sup>15</sup>

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On April 8, Wang and Zhang again asked Jiang to sign the WTPA notice. Jiang reiterated that he did not want to sign because of the unresolved wage claims and left to make a delivery. They also provided Qin with a blank WTPA form to sign, but she did not sign it at that time. Jiang then left to make a delivery and, while Qin was still present, Zhang commented that he treated his employees well, did not understand Jiang's "gangster" type of behavior, and would

<sup>&</sup>lt;sup>12</sup> Tsao corroborated the testimony of Jiang and Lin regarding the meeting and their subsequent conversations. (Tr. 108–112, 190–191, 219–220, 490–495, 513–514.)

<sup>&</sup>lt;sup>13</sup> The DOL requires that employers include certain information in each employee's WTPA notice identifying the employer and the employee's rate of pay, basis of pay rate, regular pay day, and any tips or other allowances claimed by the employer as part of the wage. (GC Exh. 10, Question 4.) The form requires employers to provide employees with copies of the notice, regardless of whether they agree or refuse to sign it. (GC Exh. 10, Question 15.)

Wang testified that he filled in the blanks on the forms before asking employees to sign them. (Tr. 91, 626–627.) That assertion was contradicted by the overwhelming credible evidence that page 1, as well as portions of page 2 of GC Exh. 9A, the WTPA notice, were blank when Wang and Zhang distributed them to most employees. (GC Exhs. 8A, 9A; Tr. 53–58, 73–76, 112–115, 276–277, 360–361, 416–419, 540–544.)

<sup>&</sup>lt;sup>15</sup> This finding is based on the consistent testimony of Jiang and Chen, and corroborated by Qin's testimony about her conversation with Wang. (Tr. 116–117, 277–279, 302–303, 336–337.)

consult with his attorney. <sup>16</sup> Qin subsequently returned the WTPA form signed, but otherwise blank, to Wang on April 11. He provided her with a copy. <sup>17</sup>

# F. The Company Discharges Chen

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Chen was employed by the Company as a part-time employee from May 2011 until January 2012, when he was promoted to full time. He was verbally warned by Wang on several occasions to curb his foul language. On occasion, Chen also refused to make deliveries for one reason or another, but was never disciplined.<sup>18</sup>

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Chen was on duty shortly after 10 p.m. on April 1, when Phoebe Yu, the cashier, handed him a delivery order. As the restaurant usually closes at 11 p.m., Chen told Yu that she needed to wait for him if he did not return before that time in order for him to clock out. Yu and Chen then got into an argument and she called Wang. Yu briefly spoke with Wang, who asked to speak with Chen. Wang assured Chen that his timecard would be updated the following day if he was unable to clock out and said Yu would wait for him to return. Chen made the delivery and returned about 11:15 p.m. Yu was still there, but Chen did not speak with her. He clocked out and left. The following day, April 2, Chen worked a full shift beginning at 11:30 a.m. By 9 p.m., he made about 20 deliveries and was about to make another delivery when Wang told him to leave. Wang said Chen would be paid his salary. Sensing he was discharged, Chen asked for an explanation, but Wang refused to provide one.<sup>19</sup>

A few days later, Chen returned to the restaurant and asked Zhang why he was fired. Zhang consulted with Wang and then told Chen that he was discharged because he refused to sign the WTPA forms. Chen responded that he did not sign because the forms were blank. Zhang returned to speak to Wang about this, but never returned to speak to Chen again.<sup>20</sup>

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<sup>&</sup>lt;sup>16</sup> Qin corroborated Jiang's credible testimony regarding the April 8 conversation. (Tr. 121–122, 339–340.)

<sup>&</sup>lt;sup>17</sup> Qin provided credible, detailed and unrefuted testimony that her WTPA form was blank when she signed and handed it to Wang. (Tr. 338–339, 663–665; GC Exh. 18.)

<sup>&</sup>lt;sup>18</sup> The Company's contention that Chen had been a problematic employee for a long period of time was not credible. Former Manager Joe Kwon testified that Chen argued with managers and other employees, spoke or laughed loudly, refused to make deliveries, and ate at the restaurant. Yet, Kwon never documented the instances or issued written warnings. Instead, Chen was promoted to full-time employee. (Tr. 566–569, 573–575.) To the contrary, the Company promoted Chen to a full-time position. (Tr. 267.)

This finding is based on Chen's credible and unrefuted testimony. (Tr. 279–284, 314–320.) While I find that Chen was in all likelihood piqued at receiving such a late delivery order, I do not credit Wang's uncorroborated hearsay and contradictory testimony regarding alleged statements made to him by Yu or his assertion that he provided Chen with an explanation. (Tr. 80–84, 526–528, 532, 596–601, 614–616, 618–622, 638–639.) Yu, a current Company employee, was subpoenaed but did not testify. (R. Exh. 12; Tr. 84–85.)

I found the testimony of Chen more credible than the vague and inconsistent testimony of Wang, Zhang, and Tsao. (Tr. 284–286.) Zhang initially testified as a Section 611(c) witness that no one was terminated for refusing to sign a blank WTPA notice. (Tr. 60–61.) That was contradicted in several respects, first by Tsao (Tr. 498–499), then by Wang's subsequent testimony that Chen was terminated for refusing to sign the notice, arguing with Yu on April 1, bad behavior in general, yelling in front of

However, in a telephone conversation with Qin, the packer, on April 6, asking when she would be returning to work, Wang told Qin he fired Chen. When Qin asked why, he replied, "three to four delivery workers, they very often gather together at the balcony, saying something, I don't know what they talk about, so I let him go first."<sup>21</sup>

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# G. The Company Discharges Lin

Toward the latter part of February, Lin asked Tsao for about a month off to take a trip to China. Lin also offered to arrange for a replacement worker while he was away. Tsao agreed, but later told Lin, just before he left, that he already had a replacement worker lined up. This was a change from the Company's previous practice of granting Lin and other employees time off on the condition that they find temporary replacement employees to cover their shifts while they were away. Tsao did not, however, indicate that Lin would not have his job waiting for him when he returned from vacation. Lin worked on March 18 and left for China the next day, March 19.<sup>22</sup>

Lin was still in China when the Company began requesting employees to sign the WTPA forms.<sup>23</sup> Upon returning from China on April 10, Lin contacted Wang about returning to work. Wang told Lin, however, that "[t]here is no position . . . I don't have a position for now. I was planning to have someone for two days on weekends. But the job isn't open yet because the menu has not been printed."<sup>24</sup> Wang mentioned no other reason for denying Lin's request to return to work.<sup>25</sup>

Lin was not recalled to work after April, even though at least four vacancies arose for delivery positions between April and August.<sup>26</sup>

customers (Tr. 80–81, 436–437, 460; GC Exh. 11 at 3) and, finally, by the Company's answer (GC Exh. 1(i), par. 6(d)) and position statement, dated September 13, 2012. (GC Exh. 11 at 33.)

<sup>21</sup> I base this finding on Qin's very credible and detailed testimony. (Tr. 336, 358.)

<sup>24</sup> Lin recorded the conversation. (R. Exh. 10; Tr. 500, 534, 623–624.)

<sup>&</sup>lt;sup>22</sup> I found Lin credible regarding his conversation with Tsao. Furthermore, Lin, Jiang, and Qin provided credible testimony, as corroborated by Zhang and Tsao, as to the Company's longstanding practice. As such, I did not credit Wang's testimony that he abandoned that practice or that Tsao, an owner with a continued periodic presence at the restaurant, no longer had the authority to grant employee vacation requests. (Tr. 66–68, 78–79, 105–106, 196–199, 228–229, 333–336, 354–356, 506.)

<sup>&</sup>lt;sup>23</sup> Curiously, the Company stated in its position statement, dated September 13, 2012, that Lin was terminated because he refused to sign the WTPA notice. (GC Exh. 11, p. 5, par. 2.)

<sup>&</sup>lt;sup>25</sup> Lin confirmed testimony by Kwon, the former manager, and Wang that several customers complained that he requested tips and, as a result, he was verbally warned several times. (Tr. 206–209, 502–504, 538–539, 570, 573–574, 576.) Nevertheless, Wang's Board affidavit, which listed no other reasons other than the lack of a job vacancy, undermined his assertion that customer complaints and other performance related reasons were factors in his refusal to reinstate Lin. (Tr. 537–539, 623–624, 643–644; GC Exh. 11.)

<sup>&</sup>lt;sup>26</sup> Wang did not refute credible testimony by Jiang and Qin, corroborated by payroll records, that the delivery workers were constantly being hired and replaced during that time. (Tr. 126–127, 351–352; GC Exh. 17.)

# H. The Company Issues Written Warning to Jiang

On April 6, Wang handed Jiang a final written warning letter because of his "refusal to sign weekly wage receipts and your refusal to sign the pay notice." At the time, Jiang had signed all of his weekly wage receipts but was still refusing to sign a blank WTPA notice form. Jiang asked Wang for an explanation, but was referred to Tsao or an attorney. Jiang spoke to Tsao about a week later, but the latter confirmed that the warning was issued because of Jiang's failure to sign the WTPA notice and employee manual. Jiang continued to maintain that he would not sign blank wage forms.<sup>27</sup>

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## **Legal Analysis**

The amended complaint alleges that the Company violated Section 8(a)(1) by discharging Chen on April 2, discharging Lin on April 10, and issuing a written warning to Jiang on April 18, because they engaged in protected concerted activity by discussing unpaid wages and possible legal action. The Company denies the allegations and insists that the adverse action taken against the discriminatees was legally justified based on misconduct and/or the WTPA.

Section 8(a)(1) of the Act deems it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7" of the Act. 29 U.S.C. § 158(a)(l). Section 7 of the Act gives employees "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. . . ." 29 U.S.C. § 157. Section 8(a)(l) of the Act therefore limits the manner in which employers may respond to those activities protected by Section 7.

In determining whether an employee's discharge or other discipline violated the Act, the Board utilizes the analysis articulated in Wright Line, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert denied 455 U.S. 989 (1982), approved in NLRB v. Transportation Management Corp., 462 U.S. 393 (1983). To establish an unlawful discharge, the General Counsel must prove, by a preponderance of the evidence, that the employee's protected conduct motivated the employer to take adverse action against them. Manno Electric, Inc., 321 NLRB 278, 280 (1996). Discriminatory motivation may be shown by establishing an employee's protected activity, employer knowledge of that activity and animus against the employee's protected conduct. Donaldson Bros., 341 NLRB 958, 961 (2004); Naomi Knitting Plant, 328 NLRB 1279, 1281 (1999); once the General Counsel has established a prima facie showing of unlawful motivation, the burden shifts to the respondent to establish that it would have discharged or refused to reinstate an employee for good cause despite his or her protected activities. Wright Line, 251 NLRB at 1089; Septix Waste, Inc., 346 NLRB 494, 496 (2006); Williamette Industries, 341 NLRB 560, 563 (2004). Once the General Counsel has met its initial burden under Wright Line, an employer does not satisfy its burden merely by stating a legitimate reason for the action taken, but instead must persuade by a preponderance of the credible

<sup>&</sup>lt;sup>27</sup> Notwithstanding a statement to the contrary in the warning letter, Wang conceded that Jiang had, in fact, signed all of his weekly pay receipts. (Tr. 87–88, 122–124, 511, 514–516, 545–546; GC Exh. 12.)

evidence that it would have taken the same action in the absence of the protected conduct. *T&J Trucking Co.*, 316 NLRB 771 (1995); *Manno Electric, Inc.*, 321 NLRB at 280 fn. 12 (1996).

Discriminatory motive may be inferred from circumstantial evidence and the record as a whole, the timing of the adverse action in relation to the protected activity, statements and actions showing the employers' animus toward the activity, and evidence demonstrating that the employer's proffered explanation for the adverse action is a pretext. *Baptist Med. Ctr./Health Midwest*, 338 NLRB 346, 377 (2002); *Tubular Corp. of America*, 337 NLRB 99 (2001); *Washington Nursing Home*, 321 NLRB 366, 375 (1996); *Best Plumbing Supply*, 310 NLRB143, 144 (1993); *American Cyanamid Co.*, 301 NLRB 253 (1991).

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## I. PROTECTED CONCERTED ACTIVITY

The Board construes the term "concerted activities" to include "those circumstances where individual employees seek to initiate or induce or to prepare for group action, as well as individual employees bringing truly group complaints to the attention of management." *Meyers Industries (Meyers I)*, 268 NLRB 493 (1984), remanded sub nom. *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985), cert. denied 474 U.S. 971 (1985), and *Meyers Industries (Meyers II)*, 281 NLRB 882 (1986), affd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988). In this context, Section 7 of the Act gives employees the right to communicate with each other regarding their wages, hours, and working conditions.

A conversation constitutes concerted activity when "engaged in with the object of initiating or inducing or preparing for group action or [when] it [has] some relation to group action in the interest of the employees." *Meyers II*, supra, 281 NLRB at 887 (quoting *Mushroom Transportation Co. v. NLRB*, 330 F.2d 683, 685 (3d Cir. 1964). Regardless as to whether group action is contemplated, however, wage discussions are a vital term and condition of employment since they generally precede organizing or other action for mutual aid or protection. As such, they are deemed inherently concerted. See *Aroostook County Regional Opthalmology Center*, 317 NLRB 218, 220 (1995), enf. denied in part on other grounds 81 F.3d 209, 214 (D.C. Cir. 1996); *Automatic Screw Products Co.*, 306 NLRB 1072, 1072 (1992), enfd. mem. 977 F.2d 582 (6th Cir. 1992); *Trayco of S.C., Inc.*, 297 NLRB 630, 634–635 (1990), enf. denied mem. 927 F.2d 597 (4th Cir. 1991); *Triana Industries.*, 245 NLRB 1258, 1258 (1979).

## A. Meetings During Breaks to Discuss Wages

Lin apprised Tsao of employees' wage concerns after the latter asked Lin why Qin contacted a worker advocacy organization. Although he was alone with Tsao at the time, Lin's statement was also concerted because it addressed the wage concerns of other employees. See *McClain & Co.*, 358 NLRB No. 118 fn. 3 (2012), citing *Salisbury Hotel*, 283 NLRB 685, 687 (1987). Also, coming in response to the employer's inquiry as to why Qin sought outside assistance, this discussion about wages would reasonably be construed as a precursor to employees organizing and seeking union assistance. *Valley Slurry Seal Co.*, 343 NLRB 233, 245 (2004); *Automatic Screw Products Co.*, 306 NLRB 1072 (1992), enfd. mem. 977 F.2d 582 (6th Cir. 1992).

Subsequently, Chen, Lin, and Jiang engaged in protected concerted activity during breaks beginning in December 2011. They discussed unpaid minimum and overtime wages, as well as taking related legal action, on the balcony outside the restaurant or at a nearby coffee shop. These discussions directly related to terms or conditions of employment. *Aroostook County Regional Ophthalmology Center*, 317 NLRB at 220.

Jiang and Lin also met with Tsao in February to discuss unpaid minimum and overtime wages. They insisted that they were owed as much as 6 years of unpaid wages. Tsao's counteroffer was rejected, but Jiang subsequently responded with a new offer. Jiang, explaining that he and Lin discussed the issue further, proposed a backpay settlement ranging from \$50,000 to \$70,000. Their discussion of unpaid wages qualified as concerted and/or for mutual aid or protection. *Aroostook County Regional Ophthalmology Center*, id.

## B. Jiang's Refusal to Sign the WTPA Form

After discussing the issue with coworkers, Jiang and Chen informed Wang and Zhang in March and April that they would not sign blank WTPA notices. They were concerned that the Company would insert false wage information after they signed. In Jiang's case, he also continued to insist on a resolution of employees' unpaid wage demands.

The concerted refusal of employees to sign documents is protected activity; it is not insubordination. *In re Air Contact Transport, Inc.*, 340 NLRB 688, 689–690 (2003); *Kolkka Tables & Finnish-American Saunas*, 335 NLRB 844 (2001). Cf. *Interlink Cable Systems*, 285 NLRB 304 (1987) (employer justified in terminating employees for violating company policy on lateness and then refusing to sign appropriate warning notice).

#### II. COMPANY KNOWLEDGE OF PROTECTED CONCERTED ACTIVITY

Wang's statement to Qin in April that he discharged Chen because he knew the delivery employees were up to something provides direct evidence of employer knowledge that delivery employees were engaged in protected concerted activity.

Additionally, there is strong circumstantial evidence that the Company knew that Chen, Lin, and Jiang were engaged in such activity between December 2011, and April. As early as December 2011, Lin told Tsao of employees' wage concerns. Thereafter, Tsao came to the restaurant and spoke to the delivery employees on several occasions as they discussed wage concerns on the balcony. Also, although he could not hear what they were discussing, Wang constantly observed the delivery employees on the balcony during break times.

In April, the Company also encountered the resistance of Cheng and Jiang to signing the WTPA notice for two reasons—it omitted required wage information and they were insisting on a resolution of their unpaid wage claims.

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#### III. COMPANY ANIMUS

The Company's owners, supervisors, and/or agents exhibited animus on several occasions toward the wage concerns of Jiang, Lin, and Chen. The first instance was in February, when Tsao responded to demands by Jiang and Lin for unpaid wages of up to \$70,000. Tsao, clearly perturbed, suggested Jiang and Lin pursue legal action to recoup the money.

In Chen's case, he was no wallflower; he was known to complain, request customer tips, speak loudly and eat at the restaurant. In the April 1 incident relied on by the Company, Chen complained about making a delivery shortly before closing time and expressed that to the cashier. Wang resolved the problem by asking the cashier to remain beyond the usual closing time. Chen made the delivery, returned to the restaurant, clocked out and left without speaking to the cashier. The next day, without explanation, Wang discharged Chen. The Company subsequently asserted that Chen was discharged day due to a history of behavioral and performance deficiencies culminating with his abusive treatment of the cashier. However, these excuses are clearly pretextual since neither Wang nor Kwon, his predecessor, ever took disciplinary action beyond verbally warning Chen for his conduct. To the contrary, Kwon promoted Chen from part-time to full-time employee shortly before he engaged in protected concerted activity.

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The suspect timing of Chen's discharge, coming around the time that Zhang expressed annoyance at Chen's refusal to sign the blank WTPA notice and the refusal to explain the discharge, followed by a myriad of unsubstantiated grounds for termination, clearly indicate that the Company's reasons for discharging Chen were pretextual. *Holsum De Puerto Rico, Inc.*, 344 NLRB 694, 714 (2005); *Medtech Security, Inc.*, 329 NLRB 926, 929–930 (1999); *MJ Mechanical Services*, 324 NLRB 812, 817 (1997); *Montgomery Ward & Co.*, 316 NLRB 1248, 1253 (1995); *Hudson Neckware, Inc.*, 302 NLRB 93, 94–95 (1991); *De Jana Industries*, 305 NLRB 845, 848 (1991).<sup>28</sup>

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In Lin's case, the Company provided vague and inconsistent reasons for discharging him. See *Cumberland Shoe Corp.*, 156 NLRB 1130, 1155 fn. 31 (1966). Initially, the Company asserted multiple, but unsubstantiated, customer complaints and behavioral deficiencies as the reason for Lin's discharge.<sup>29</sup> However, Wang's explanation to Lin on April 10, after he returned from an approved month-long trip to China and sought to return to work, made no mention of past performance or behavior. Instead, Wang told Lin that he did not have a vacant delivery position. That excuse turned out to be false, however, as Wang proceeded to hire and replace at least four delivery employees between April and August. Subsequently, in its position statement, the Company asserted that Lin was discharged because he refused to sign the WTPA notice, a preposterous notion since he was out of the country when it was distributed to employees and never given an opportunity to sign it when he returned.

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Based on the Company's inconsistent or shifting reasons for its actions, a reasonable inference may be drawn that the reasons offered are pretexts designed to mask an unlawful

<sup>29</sup> Again, I did not give any draw any inference based on the General Counsel's rehiring of Lin.

<sup>&</sup>lt;sup>28</sup> I did not give any weight to the General Counsel's contention that the Company's subsequent employment of Chen was evidence that it did not consider him dangerous.

motive. *Inter-Disciplinary Advantage, Inc.*, 349 NLRB 480, 506 (2007), citing *Mt. Clemens General Hospital*, 344 NLRB 450, 458 (2005); *Holsum De Puerto Rico, Inc.*, 344 NLRB 694, 714 (2005); and *GATX Logistics, Inc.*, 323 NLRB 328, 335 (1997). See also *Airport 2000 Concessions, LLC*, 346 NLRB 958, 978 (2006) (citing *Black Entertainment Television, Inc.*, 324 NLRB 1161 (1997) (relying in shifting explanation in position statement and at the hearing), and *Vincent M Ippolito, Inc.*, 313 NLRB 715, 724 (1994), enfd. 54 F.3d 769 (3d Cir. 1995)); *US. Coach-Works, Inc.*, 334 NLRB 955, 957 (2001); *Enjo Architectural Millwork*, 340 NLRB 1340 (2003); *Tracer Protection Services*, 328 NLRB 734 (1999).

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In Jiang's case, his refusal to sign the WTPA notice resulted in resentment by Zhang and a remark by Wang characterizing him as a hooligan or gangster. On April 16, the Company issued a written warning citing not only Jiang's failure to sign the WTPA notice, but also his weekly pay receipts. At the hearing, however, the Company conceded that Jiang actually signed all of his weekly pay receipts. It also took the position that no one was disciplined for refusing to sign the WTPA notice. These variations in the Company's position between the time it issued the warning and the hearing are clear evidence of pretext. See *City Stationery, Inc.*, 340 NLRB 523, 524 (2003).

The General Counsel also contends that the layoffs of Lin and Chen, half of the delivery department, represents a mass layoff and, thus, further evidence of animus. See *Alpo Petfoods, Inc. v. NLRB*, 126 F.3d 246, 256 fn. 5 (4th Cir. 1997); *Rainbow News 12*, 316 NLRB 52, 67–68 (1995); *Mini-Togs, Inc.*, 304 NLRB 664, 648 (1991); *Davis Supermarkets*, 306 NLRB 426 (1992); *Hyatt Corp.*, 939 F.2d 361, 375–376 (6th Cir. 1991); *ACTIV Industries, Inc. v. General Teamsters & Allied Workers*, 277 NLRB 356 (1985); *Birch Run Welding & Fabricating, Inc. v. NLRB*, 761 F.2d 1175, 1180 (6th Cir.1985); *Merchants Truck Line, Inc. v. NLRB*, 577 F.2d 1011, 1016 (5th Cir.1978); *Majestic Molded Prods. v. NLRB*, 330 F.2d 603, 606 (2d Cir.1964). This argument has merit, especially when the layoffs are viewed in the context of Wang's comment to Qin that he discharged Chen because he observed the delivery employees conversing on the balcony and was concerned as to what they might be discussing.

## IV. THE COMPANY'S BURDEN

The General Counsel established a prima facie case that Chen and Lin were discharged, and Jiang was issued a written warning, because they engaged in protected concerted activities relating to unpaid wages. As the Company's grounds for the discipline was pretextual, it fails by definition to show that it would have taken the same action for those reasons, absent the protected conduct, and thus there is no need to perform the second part of the *Wright Line* analysis." See *Golden State Foods Corp.*, 340 NLRB 382, 385 (2003) (citing *Limestone Apparel Corp.*, 255 NLRB 722 (1981), enfd. 705 F.2d 799 (6th Cir. 1982).

Nevertheless, the Company did not prove that it would have taken similar action in the absence of the protected conduct by Lin, Chen, and Jiang. There is no evidence that Wang or Kwon, his predecessor, ever discharged anyone for misconduct prior to discharging Lin and Chen in April. Thus, even if Chen and Lin engaged in misconduct, there was no Company policy or practice warranting their discharge. Similarly, there was no evidence that the Company, prior to disciplining Jiang, ever issued a written warning to employees for

insubordination or any other workplace infraction. In fact, the warning was written by the Company's litigation counsel hired to battle ongoing litigation relating to the FLSA.

Regarding the failure to reinstate Lin because his job allegedly disappeared while he was on vacation, the evidence revealed that Wang hired and replaced several delivery employees after April 10. Moreover, there was a longstanding Company practice of permitting employees to travel to China for weeks or months at a time and returning to resume their jobs. There is no credible evidence that such a practice changed while Lin was on vacation. Thus, it is clear that Lin, in the absence of engaging in protected concerted activity in the months leading up to his trip to China in March, would have had his job waiting for him when he returned.

#### **CONCLUSIONS OF LAW**

- 1. The Company is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
  - 2. By discharging Lian Ton Chen and Chang Hui Lin on April 2 and 10, respectively, and issuing a written warning to Jiang Xing Duan on April 18, because they engaged in protected concerted activities, the Company has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) of the Act.
  - 3. The Company's unfair labor practices described above affected commerce within the meaning of Section 2(6) and (7) of the Act.

25 REMEDY

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Having found that the Company has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

The Company, having discriminatorily discharged Lian Ton Chen and Chang Hui Lin for a period of time and then reinstated them, must make them whole for any loss of earnings and other benefits. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010).

The Company shall file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters. The Company shall also compensate Chen and Lin for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year, *Latino Express, Inc.*, 359 NLRB No. 44 (2012).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>30</sup>

#### **ORDER**

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The Respondent, East Village Grand Sichuan, Inc. d/b/a Grand Sichuan (the Company), New York, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

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- (a) Discharging, warning, or otherwise discriminating against any employee for engaging in protected concerted activity.
- (b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.
  - 2. Take the following affirmative action necessary to effectuate the policies of the Act.
- (a) Make Lian Ton Chen and Chang Hui Lin whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.
  - (b) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful discharges of Lian Ton Chen and Chang Hui Lin, and the written warning issued to Jiang Xing Duan, and within 3 days thereafter notify the employees in writing that this has been done and that the discharges and written warning will not be used against them in any way.
- (c) Preserve and, within 14 days of a request, or such additional time as the Regional

  Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

<sup>&</sup>lt;sup>30</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(d) Within 14 days after service by the Region, post at its restaurant in New York, New York, copies of the attached notice marked "Appendix" in English, Mandarin, Cantonese, and Foochow. Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by the Company's authorized representative, shall be posted by the Company and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Company customarily communicates with its employees by such means. Reasonable steps shall be taken by the Company to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Company has gone out of business or closed the facility involved in these proceedings, the Company shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Company at any time since April 2, 2012.

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(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Company has taken to comply.

20 Dated, Washington, D.C. November 6, 2013

Michael A. Rosas Administrative Law Judge

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<sup>&</sup>lt;sup>31</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

#### **APPENDIX**

#### NOTICE TO EMPLOYEES

Posted by Order of the National Labor Relations Board An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

#### FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union Choose representatives to bargain with us on your behalf Act together with other employees for your benefit and protection Choose not to engage in any of these protected activities.

WE WILL NOT discharge, warn, or otherwise discriminate against any of you for discussing or complaining about wages.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL make Lian Ton Chen and Chang Hui Lin whole for any loss of earnings and other benefits resulting from their discharge, less any net interim earnings, plus interest compounded daily.

WE WILL file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters.

WE WILL compensate Lian Ton Chen and Chang Hui Lin for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful discharges of Lian Ton Chen and Chang Hui Lin, and the written warning issued to Jiang Xing Duan, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the discharges will not be used against them in any way.

		EAST VILLAGE GRAND S	SICHUAN, INC.
		D/B/A GRAND S	SICHUAN
Dated	By		
-		(Representative)	(Title)

JD-81-13

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: <a href="www.nlrb.gov.26">www.nlrb.gov.26</a> Federal Plaza, Federal Building, Room 3614, New York, NY 10278-0104

# 212-264-0300, Hours: 8:45 a.m. to 5:15 p.m. THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (212) 264-0346.